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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1492

WALTER E. WASHINGTON, Individually and in his capacity as Commissioner of the District of Columbia, et al.,
Petitioners,

v.

ALFRED E. DAVIS, et al.,
GEORGE HARLEY
JOHN D. SELLERS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, the Mayor-Commissioner of the District of Columbia and the District's Metropolitan Police Chief, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-titled cause on February 27, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported and is set forth in the Appendix at pages 1 through 45. The opinion of the District Court is reported

at 348 F. Supp. 15 (1972), and is set forth in the Appendix at pages 48 through 52.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals departed from established criteria recognized by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), in overturning the District Court's ruling that the Metropolitan Police Department's professionally validated entrance test, designed to measure an individual's verbal ability to succeed in the Department's recruit training program, is job related and non-discriminatory.

2. Whether the Court of Appeals misapplied this Court's decision in *Griggs* in concluding, on the basis of minority pass-fail data alone, that the test had a racially disproportionate impact sufficient to shift the burden of showing its job relatedness, notwithstanding a favorable correlation between minority recruitment percentages and minority population percentages.

STATEMENT OF THE CASE

Petitioners are the Mayor-Commissioner of the District of Columbia and the District's Metropolitan Police Chief. Respondents are unsuccessful applicants for appointment to the Metropolitan Police Department (hereinafter "the Department") who failed the Department's entrance test (hereinafter "Test 21"). Petitioners seek review of the decision of the United States Court of Appeals for the District of Columbia Circuit in which the Court held,

with Judge Robb dissenting, that Test 21 has a disproportionate racial impact and was not shown to be job related. In so holding, the Court of Appeals reversed the decision of the United States District Court for the District of Columbia. The District Court upheld the validity of Test 21 and entered summary judgment in petitioners' favor. The key facts are as follows.

The Department recruits officers in the 20-29 age group primarily from the Metropolitan Washington area which has a radius of 50 miles from the center of the city. Since Chief Wilson took office in August 1969, the Department has made significant efforts to recruit black officers, and 44% of all new recruits have been black (A. 76, App. 49).[1] An affidavit of the Department's Administrative Services Officer executed on July 17, 1972, recites that:

> "The total population of the District in the 20-29 age group [according to the 1970 Census] was reflected to be 142,161 with the racial contrast being as follows:

Black	Males	42,447
	Females	53,352
		95,799
White	Males	22,711
	Females	23,651
		46,362

> The 20-29 age group is that age group from which new officers are recruited. When viewed from the standpoint that for our recruiting purposes the 'local' or metropolitan Washington Area is a radius of 50 miles, a rate of hiring blacks of 44% is demonstrative of the success of the Department's effort to re-

[1] The Appendix filed in the Court of Appeals has been certified to this Court. References to that document will be prefaced by the designation "A." References to the Appendix to this petition will be prefaced by the designation "App."

> cruit blacks since that percentage is significantly higher than their proportional representation in the 'local' recruiting area." (A. 76-77.)

A detailed survey of recruiting in the period January 1970 to September 1970 shows that more than 50% of officers recruited were black (A. 72-73; App. 49-50). Respondents, as applicants for appointment, took and failed Test 21 in August 1970 (A. 30). Over the past several years, many blacks, numbering in the hundreds, passed the test but, for other reasons, did not become members of the Department (App. 50). Among the applicants tested in the District of Columbia from 1968 to 1971, 57% of the blacks failed the test as compared to a failure rate of 13% for whites (App. 4).

Applicants for appointment to the Department are required, *inter alia*, to achieve a minimum score of 40 out of a possible score of 80 in Test 21. Prepared by the United States Civil Service Commission (hereinafter "the Commission"), Test 21 is a straightforward test of verbal ability consisting of vocabulary, reading comprehension, interpretation of reading passages, and general information items. It is used to predict the success of applicants in the Department's Training Academy. (A. 42, 110, 129-152.) A study done by the Commission in November 1967 (App. 53-62) firmly established a clear and positive relationship for both blacks and whites between their Test 21 scores and their academic averages at the Training Academy. The study was tendered to the District Court together with the affidavits of various psychologists who analyzed and explained the study and commented favorably on Test 21 as a predictive device designed to ascertain whether an individual has the verbal ability to be trained as a policeman (A. 96-128).

One such psychologist, in addition to reviewing Test 21, reviewed the study materials distributed to recruits at the Training Academy, including materials relating to the Law of Arrest, Search and Seizure, the Rules

of Evidence, the Criminal Law and Procedure sections of the District of Columbia Code, and the Police and Traffic Regulations of the District of Columbia. Based on such a review, she observed, *inter alia*, that "* * * the level of verbal ability measured by Test 21 is, at most, no higher than that required for successful completion of recruit school training as determined by the final grade average attained by the recruit" (A. 107-108). This psychologist concluded that:

> "* * * the recruit must have the verbal ability to read and understand rather complex, legalistic language. It is my opinion that there is a direct and rational relationship between the content and difficulty of Test 21 and successful completion of recruit school training." (A. 108.)

In upholding Test 21, the District Court heid that it did not have an adverse racial impact. The court observed that, notwithstanding the relatively higher percentage of black test failures, the percentage of black officers recruited by the Department closely approximates the population ratio for the eligible 20-29 age group (App. 49). In addition, the court reviewed the syllabus of the training course at the Police Academy and noted that it was designed to meet the Metropolitan Police Department's needs to train recruits who have the verbal ability to assimilate a variety of matters pertinent to modern law enforcement. The court held that Test 21 was a fair measure of that verbal ability and that "the undisputable facts prove the test to be reasonably and directly related to the requirements of the police training recruit program" (App. 50-51).

In reversing, the Court of Appeals construed this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Notwithstanding the favorable correlation between minority population data and minority recruitment data, the Court held, on the basis of pass-fail rates

alone, that the challenged examination has a racially disproportionate impact and that the burden of showing its job relatedness accordingly shifted to petitioners (App. 8). In ruling that petitioners failed to discharge that burden, the Court was "willing to assume that * * * [petitioners] have shown that Test 21 is predictive of future progress in recruit school" (App. 12-13). However, the Court concluded that recruit trainability was inapposite as a criterion for validating Test 21, stating that (App. 17):

> "* * * As long as no one with a score below 40 enters Recruit School, as long as all recruits pass Recruit School, as long as the Department's actions concede that Recruit School average has little value in predicting job performance, and as long as there is no evidence of any correlation between the Recruit School average and job performance, we entertain grave doubts whether any of this type of evidence could be strengthened to the point of satisfying the heavy burden imposed by *Griggs*."

REASONS FOR GRANTING THE WRIT

The ruling of the Court of Appeals involves the right of a modern day police department to administer to applicants for appointment an examination designed to ascertain whether they possess the verbal ability to be trained as policemen. The importance of such a matter in an historical era characterized by criminal law concepts of evolving complexity, to which the contemporary policeman is constantly exposed, is readily apparent. The corresponding need for government and law enforcement officials to ascertain that police recruits have the requisite verbal skills to be properly trained in the application of these vital concepts is equally clear.

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971), is the only case in which this Court has, to date, rendered

an opinion concerned with employment testing in the context of a racial discrimination claim. This Court strongly suggested in *Griggs*, however, that a test must be judicially upheld if "directed or intended to measure the ability to learn to perform a particular job" (401 U.S. at 428). See also 401 U.S. at 434-435. That suggestion indeed squares with the legislative history of Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h), with which this Court was there concerned. See 110 Cong. Rec. 13492, 13503-13505, 13724; see also Note, *Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1126 (1971); cf. App. at 17-18, n. 59. In prohibiting the use of Test 21 as a means of determining recruit trainability, the Court of Appeals has relied on standards of an extremely rigid and highly questionable nature. The need for clarifying and instructive pronouncements by this Court is underscored by a comparative analysis of other recent federal appellate decisions in which the courts significantly fail to countenance such a rigid approach to the trainability matter involved.

In *Buckner* v. *Goodyear Tire and Rubber Co.*, 339 F. Supp. 1108 (N.D. Ala., 1972), the District Court, in an opinion subsequently adopted by the Fifth Circuit Court of Appeals, 476 F. 2d 1287 (1973), upheld a test shown to be related to success in the employer's apprenticeship training program. The court's view of the circumstance that no one selected for the training program failed (and comparatively less stringent view of the employer's burden) stands in sharp contrast to the rigid approach taken by the Court of Appeals in this case (App. 17). In that connection, the District Court said (339 F. Supp. at 1115):

> "It is at least of some significance that since the tests were utilized no one selected for the program

has failed in either the academic or practical phases of training, though a few have dropped out before completion."

And in *Spurlock* v. *United Airlines, Inc.*, 475 F. 2d 216 (10th Cir., 1972), the court, in holding a college degree requirement related to the ability to be trained for the job of airline flight officer, noted an evidentiary showing that "the possession of a college degree indicated that the applicant had the ability to understand and retain concepts and information given in the atmosphere of a classroom or training program" (475 F. 2d at 219). In discussing the nature of the employer's burden in light of the job involved, the court said (id.):

> "When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminates against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related. *On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related.* * * *" (Emphasis added.)

Given the nature of the policeman's job in a contemporary society, the failure of the Court of Appeals to take a similar approach in this case surely invites this Court's examination. At a time in history when all police officers, and certainly newly recruited patrolmen, are frequently faced with matters such as advising defendants of their rights under the Miranda decision, determining whether there is probable cause for an arrest or search, swearing out warrants, etc., the verbal ability necessary for the assimilation of a rudimentary knowledge of problems

such as these is necessary if the public is to be properly protected and the law effectively enforced. This takes on added significance in an era of rising lawlessness and criminal violence. While these considerations do not excuse a police department from demonstrating that an entrance test is rationally related to recruit trainability, it is equally clear that an examination designed to gauge the existence of that essential trait must not be invalidated simply because the department cannot prove its case to the hilt. Yet the ruling of the Court of Appeals, if permitted to stand, accomplishes precisely such a result.

The need for settlement by this Court of the important matter involved is further illustrated by a consideration of the decisions of lower federal courts which have considered the job relatedness of other police entrance tests from the standpoint of predicting trainability. It must be noted in this regard that the opinion of the Court of Appeals contains the only extensive discussion to date of that matter by any Circuit Court of Appeals. The ruling of the District Court in *Commonwealth of Pennsylvania* v. *O'Neill*, 348 F. Supp. 1084 (E. D. Pa., 1972), upon which the Court of Appeals places considerable reliance, was affirmed on appeal by an equally divided en banc court insofar as the District Court's rulings as to police hiring procedures were concerned. 473 F. 2d 1031 (3rd Cir., 1973). And in *Bridgeport Guardians, Inc.* v. *Members of Bridgeport C. S. Com'n.*, 354 F. Supp. 778 (D. Conn., 1973), aff'd. in part, rev'd. in part, 482 F. 2d 1333 (2nd Cir. 1973), the Court of Appeals had no occasion to canvass the police trainability question involved here because no criterion related validity study as to trainability was proffered in the District Court. 354 F. Supp. at 789-790. Thus, unlike in the instant case, it was not established "that high test scores correlate well with success in the training program * * *." 354 F.

Supp. at 791. It is quite significant, however, that the District Court, in commenting upon the decision of District Judge Gesell in this very case, noted that the "approach of that decision is consistent with the analysis here." 354 F. Supp. at 793. The court went on to state (id.) that:

> "* * * The exam [involved in the instant case] was considered in the context in which it was used, and it was found acceptable in light of all the circumstances of the case. These included some correlation between high test scores and high job performance, the use of a 40% passing grade, the admission of all applicants with this passing grade to the police training academy, concerted efforts by the police department to assist those in the academy to complete the required training program, extensive recruiting efforts among minority groups, and the fact that 44% of recently hired policemen were Blacks. In those circumstances the exam was found to have sufficient utility in selecting policemen. * * *"

And in *Castro* v. *Beecher*, 334 F. Supp. 930 (D. Mass., 1971), aff'd. in part, 459 F. 2d 725 (1st Cir., 1972), Judge Wyzanski observed that no evidentiary attempt had been made to relate an intelligence test to the capacity of applicants to either be trained for or perform a policeman's job (334 F. Supp. at 942), and went on to note (id. at n. 9) that:

> "It is possible that intelligence tests may be predictive of ability to be trained for, but not of ability ultimately to perform, a policeman's job. See Note 84 Harv. L. Rev. 1109, 1126. It is also possible that, no matter how well devised, intelligence tests and even aptitude tests are not highly reliable indicators of performance ability as a policeman. Ibid., pp. 1120-1121. * * *"

Other police testing cases cited by the Court of Appeals (App. 15, n. 51) only serve to underscore the unsettled

nature of the important question involved. Thus, in *Officers for Justice* v. *Civil S. Com'n, C. & C. San Francisco*, 371 F. Supp. 1328, 1337 (N. D. Cal., 1973), unlike in the instant case, a comparison by an expert of "the scores of candidates on the entry test with the scores they later received on tests after time spent in training at the police academy" disclosed that "all individuals performed, in rough terms, equally well on the latter test, regardless of how well they performed on the former examination." And in *Smith* v. *City of East Cleveland*, 363 F. Supp. 1131, 1147 (N. D. Ohio, E. D., 1973), the validation studies, unlike that involved here, "were apparently done with respect to whites only."

The Court of Appeals has additionally held in effect that statistical data depicting minority pass-fail rates must always constitute proof of a racially disproportionate impact sufficient to shift the burden of establishing job relatedness regardless of the significance of other data tending to show the absence of an adverse racial impact (App. 8). Although this Court held in *Griggs* that disproportionate minority pass-fail rates were sufficient to shift the burden of demonstrating job relatedness of the test in that particular case (401 U.S. at 430-431), this Court did not convey the slightest suggestion that a District Court abuses its discretion in declining to make a determination of racially disproportionate impact and require a demonstration of job relatedness on the basis of minority pass-fail data *alone*, when, as here, minority recruitment percentages significantly correlate with minority population percentages. Indeed, the statistical pass-fail data in *Griggs* combined with evidence of a former longstanding practice of job preference to whites not depicted by this record (cf. 401 U.S. at 426). And various lower federal courts, in dealing with the matter of disproportionate racial impact in cases involving employment testing, appear to concern themselves not

so much with factors such as comparative pass-fail rates as with percentages of racial minorities actually employed by the entity involved *vis a vis* statistics such as those relating to overall minority population percentages. See *Chance* v. *Board of Examiners*, 458 F. 2d 1167, 1173, 1176 (2nd Cir., 1972); *Castro* v. *Beecher*, *supra*, 334 F. Supp. at 935; *Western Addition Community Organization* v. *Alioto*, 340 F. Supp. 1351, 1352 (N. D. Cal., 1972).

Minority pass-fail data may, of course, justify a finding of racially disproportionate impact in an appropriate case, especially in the absence of other statistical data. But the holding of the Court of Appeals that such data invariably serves this purpose no matter how impressively minority recruitment percentages compare with minority population mix (App. 8), if not a clear misapapplication of *Griggs*, surely presents a significantly important question as to the proper applicability of that decision.

Clearly, therefore, the apparent conflict of the decision of the Court of Appeals with this Court's decision in *Griggs* v. *Duke Power Co.*, *supra*, the unclear, confusing, and conflicting state of the post-*Griggs* decisional trend, and the compelling policy considerations directed to the recruitment of verbally skilled policemen combine to present a question of sufficient substance and importance to warrant review by this Court.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-2105

ALFRED E. DAVIS, ET AL.,
GEORGE HARLEY, JOHN D. SELLERS, APPELLANTS

v.

WALTER E. WASHINGTON, Individually and In His Capacity as Commissioner of the District of Columbia

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Appeal from the United States District Court
for the District of Columbia

(D.C. Civil No. 1086-70)

Decided February 27, 1975

Richard B. Sobol, with whom *George Cooper*, *Richard T. Seymour* and *Ralph J. Temple* were on the brief, for appellants.

David P. Sutton, Assistant Corporation Counsel for the District of Columbia, with whom *C. Francis Murphy*, Corporation Counsel, and *Richard W. Barton*, Assistant Corporation Counsel, were on the brief, for appellee Washington.

Harold H. Titus, Jr., United States Attorney at the time the brief was filed, with whom *John A. Terry* and

Douglass J. McCollum, Assistant United States Attorneys, were on the brief, for the federal appellees. *Earl J. Silbert*, United States Attorney, also entered an appearance for the federal appellees.

Before MCGOWAN, ROBINSON and ROBB, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROBINSON.

Dissenting Opinion filed by *Circuit Judge* ROBB.

ROBINSON, *Circuit Judge*: On behalf of all blacks who have unsuccessfully sought appointment to the District of Columbia Metropolitan Police Department since 1968, appellants intervened in this class action [1] to assert the claim that Test 21, a written entrance examination administered to all applicants, discriminates against blacks in violation of the Due Process Clause of the Fifth Amendment and federal civil rights laws.[2] The District

[1] The litigation originally was a class action challenging allegedly discriminatory practices in promotion of police officers within the Department. That action was decided adversely to the original plaintiffs, *Davis* v. *Washington*, 352 F.Supp. 187 (D.D.C. 1972), and is not involved in this appeal.

[2] Until 1972, governmental employers were not subject to Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § VII, 78 Stat. 253, 42 U.S.C. §§ 2000e *et seq.* (1970), and governmental employees in the states sought relief from allegedly discriminatory practices under the Equal Protection Clause of the Fourteenth Amendment. *E.g.*, *Castro* v. *Beecher*, 459 F.2d 725, 733 (1st Cir. 1972); *Chance* v. *Board of Examiners*, 458 F.2d 1167, 1169 (2d Cir. 1972); *Carter* v. *Gallagher*, 452 F.2d 315, 318 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). Since the equal protection requirement is imposed on the Federal Government, and its actions in governing the District of Columbia, by the Fifth Amendment Due Process Clause, *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Bolton* v. *Harris*, 130 U.S.App.D.C. 1, 4 n.3, 395 F.2d 642, 645 n.3 (1968), these decisions are plainly relevant to the constitutional contentions in the instant case. In addition to their constitutional base, appellants seek a statutory foundation for relief in the Civil Rights Act of 1870. Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144, 42 U.S.C. § 1981 (1970).

Although appellants' complaint did not allege a violation of Title VII of the Civil Rights Act of 1964, which then was inapplicable

Court concluded that Test 21 was nondiscriminatory in design and operation and was "reasonably and directly related to the requirements of the police recruit training program." [3] The court entered summary judgment for the defendants, appellees here,[4] and this appeal followed.[5] We hold that appellants have demonstrated on the record that Test 21 has a racially disproportionate impact,[6] and

to the Federal Government, decisions applying Title VII furnish additional instruction as to the legal standard governing the issues raised in this case. See Part I(B), *infra*. The many decisions disposing of employment discrimination claims on constitutional grounds have made no distinction between the constitutional standard and the statutory standard under Title VII. *E.g.*, *Davis* v. *Washington*, *supra* note 1, 352 F.Supp. at 191; *Bridgeport Guardians, Inc.* v. *Civil Serv. Comm'n*, 482 F.2d 1333 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973); *Fowler* v. *Schwarzwalder*, 351 F.Supp. 721 (D.Minn. 1972). Moreover, while the Title VII protections did not extend to appellants at the time of intervention, Congress has since amended Title VII to reach charges of racial discrimination in federal employment, Equal Employment Opportunity Act of 1972, Pub.L. No. 92-261, § 717, 86 Stat. 211, 42 U.S.C. § 2000e-16 (Supp. II 1972), and appellants unquestionably are entitled to the benefit of the amendment. See *De Rodulfa* v. *United States*, 149 U.S.App.D.C. 154, 164, 461 F.2d 1240, 1250, *cert. denied*, 409 U.S. 949 (1972), and cases cited; *Womack* v. *Lynn*, —— U.S. App.D.C. ——, 504 F.2d 267 (1974).

[3] *Davis* v. *Washington*, 348 F.Supp. 15, 17 (D.D.C. 1972).

[4] The defendants were Walter E. Washington, Mayor-Commissioner of the District of Columbia; Jerry V. Wilson, Chief of Police at the time of intervention (District appellees); and the commissioners of the United States Civil Service Commission (federal appellees).

[5] The District Court made the determination and direction authorized by Fed.R.Civ.P. 54(b). At the time summary judgment was granted, the claims of discrimination in promotion were still pending. See note 1, *supra*.

[6] See Part II, *infra*. We have taken Judge Friendly's advice and used this term to avoid the pejorative connotations of synonymous phrases. *Vulcan Soc'y* v. *Civil Serv. Comm'n*, 490 F.2d 387, 391 n.4 (2d Cir. 1973). See *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017, 1019 (1st Cir. 1974); *United States* v. *Chicago*, 385 F. Supp. 543, 550 (N.D.Ill. 1974).

that appellees have not met their heavy burden of showing that the test is related to job performance.[7] Accordingly, we reverse the summary judgment and remand for further proceedings.

I. The Applicable Legal Standard

A. *The Facts*

Applicants are appointed to positions in the Metropolitan Police Department if they satisfy character and physical standards, have a high school diploma or the equivalent, and receive a raw score of 40 or above on Test 21.[8] The test was developed by the Civil Service Commission for general use throughout the federal service as a measure of verbal ability, rather than specifically to measure the full range of skills required to perform the tasks of a police officer.[9] The Department was not involved in the formulation of Test 21.

Appellants tendered to the District Court statistical evidence purportedly demonstrating that Test 21 has a disproportionate impact on black applicants. Among the applicants tested in the District of Columbia from 1968 through 1971, 57% of the blacks failed the test, as compared to a failure rate of 13% for whites.[10] Although black applicants thus failed Test 21 at a rate more than

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[7] See Part III, *infra*.

[8] *Davis* v. *Washington*, *supra* note 3, 348 F.Supp. at 16.

[9] *Id.*

[10] Appellants' Appendix at 57 (affidavit of C. Terrence Ireland, ¶ 2). Among the applicants tested outside the District in 1970 and 1971, the failure rate was 47% for blacks and 12% for whites. *Id.* These data were obtained from the District appellees in discovery proceedings, and include minorities other than blacks in the statistics given for whites. Thus, while "whites and others" would more accurately state the evidence presented to the court, for convenience we will refer to this category as "whites."

four times greater than the rate for whites, appellees dispute the capability of these statistics to prove a racially disproportionate impact. They further contend that, regardless of the sufficiency of this evidence, Test 21 can be used in selecting police officers because it is sufficiently job related. In support of the latter proposition, they offer a validity study[11] conducted under the auspices of the Civil Service Commission demonstrating, they claim, that scores on Test 21 accurately predict performance in Recruit School, the Department's police training program.

B. *The Griggs Standard*

In *Griggs* v. *Duke Power Co.*,[12] the Supreme Court considered the legality of standardized intelligence tests under Title VII of the Civil Rights Act of 1964.[13] "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance," the Court said, "the practice is prohibited."[14] Once it is shown that a particular selection procedure has an exclusionary effect on minority applicants, there is a heavy burden on the employer to show that discriminatory procedure "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used."[15] In the instant case, if appellants' evidence is sufficient to

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[11] David L. Futransky, Relation of D.C. Police Entrance Test Scores to Recruit School Performance and Job Performance of White and Negro Policemen, mimeograph, November, 1967 (hereinafter cited as Futransky Study).

[12] 401 U.S. 424 (1971).

[13] See note 2, *supra*, and accompanying text.

[14] 401 U.S. at 431.

[15] *Id.* See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 & n.14 (1973); *Bridgeport Guardians, Inc.* v. *Civil Serv. Comm'n*, *supra* note 2, 482 F.2d at 1337; *Officers for Justice* v. *Civil Serv. Comm'n*, 371 F.Supp. 1328, 1336 (N.D.Cal. 1973); *Smith* v. *East Cleveland*, 363 F.Supp. 1131, 1147 (N.D. Ohio 1973).

show an exclusionary impact on black applicants, and we hold that it is,[16] then the Department must shoulder the heavy burden of justifying Test 21 by demonstrating that results on the test are satisfactorily related to successful performance of the job of a police officer.

The District Court ruled that appellants' "minimal" showings (a) that the number of black officers in the Department is not proportionate to the population mix of the District, (b) that a higher percentage of blacks fail Test 21 than whites and (c) that Test 21 has not been validated to show its reliability for measuring job performance, did not suffice to shift the burden of proof to appellees.[17] We find that, in so concluding, the court incorrectly applied the controlling legal principles and indulged an erroneous standard. The court's approach led it into error in resolving the two crucial issues of the case—the racially disproportionate impact [18] and the job relatedness [19] of Test 21.

II. The Racially Disproportionate Impact of Test 21

The evidence in the record establishes that the percentage of black failures on Test 21 is far greater than white failures.[20] Despite the clear implication of this stark fact, the District Court found that Test 21 was "neither so designed nor operates to discriminate against otherwise qualified blacks," [21] and in this regard the court erred. The cases hold, and we agree, that evidence establishing that significantly more blacks than whites fail a

[16] See Part II, *infra*.

[17] *Davis* v. *Washington*, *supra* note 3, 348 F.Supp. at 16.

[18] See Part II, *infra*.

[19] See Part III, *infra*.

[20] See text *supra* at note 10.

[21] *Davis* v. *Washington*, *supra* note 3, 348 F.Supp. at 17.

written entrance examination given to all applicants is sufficient, as a matter of law, to show the racially disproportionate impact of the examination.[22] The disparity disclosed in this case—more than four to one—is larger than differences held sufficiently disproportionate in other cases.[23] Indeed, absent evidence revealing some other reason for the lopsided failure rates appearing here, it is difficult to imagine how disproportionate effect could ever be better demonstrated.

The District appellees contend that the court could properly find that appellants had not made the necessary showing simply by considering the relationship between the percentage of blacks in the Metropolitan Police Department and the percentage of black population in the community.[24] They assert that other courts have been

[22] *Castro* v. *Beecher*, *supra* note 2, 459 F.2d at 729 (passing rate 25% for blacks and 65% for whites); *Bridgeport Guardians, Inc.* v. *Civil Serv. Comm'n*, *supra* note 2, 482 F.2d at 1335 (passing rate for whites 3½ times the black rate); *Chance* v. *Board of Examiners*, *supra* note 2, 458 F.2d at 1171 (passing rate for whites 1½ times greater than passing rate for blacks); *United States* v. *Chicago*, *supra* note 6, 385 F.Supp. at 550 (failure rate for blacks twice the rate for whites); *Pennsylvania* v. *O'Neill*, 348 F.Supp. 1084, 1089-90 (E.D.Pa. 1972), *aff'd in part and vacated in part*, 473 F.2d 1029 (3d Cir. 1973) (1.82 times as many whites pass as blacks).

[23] Compare the cases cited *supra* note 22.

[24] See *Davis* v. *Washington*, *supra* note 3, 348 F.Supp. at 16. There is some disagreement concerning what figures might be relevant in this regard. Appellees contend that the Department recruits primarily within a 50-mile radius of the District of Columbia; they assert that the percentage of blacks in the Department compares favorably with the percentage of blacks in the 20-29 age group in the area of recruitment. Appellants argue, however, that the pertinent population figures are those for the District alone; and since the proportion of blacks in the District is much higher than in surrounding areas, they seek support in the comparison they make. We decline to resolve the dispute, because we deem neither comparison material to this appeal. See *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra* note 6, 504 F.2d at 1020 n. 4.

more concerned with that type of information than with pass-fail rates. Our research discloses, however, that population data have been considered judicially for only two purposes. There are a number of cases that have held population data alone sufficient to show racially disproportionate impact, but in the apparent absence of data on pass-fail rates.[25] Other courts have noted population data merely to corroborate a showing of racially disproportionate impact based on pass-fail rates.[26] There is no authority—and we decline to provide any—for the proposition that proof of a racially disproportionate impact must encompass both pass-fail rates and disparate population figures. We think the precedents establish that either demonstration is legally sufficient to shift the burden of establishing job relatedness to the employer.[27]

Appellees also urge us to consider the affirmative efforts of the Metropolitan Police Department to recruit black officers. We think such efforts are irrelevant to the issue—the discriminatory *effect* of Test 21 itself. The employer's lack of discriminatory intent was deemed irrelevant by the Supreme Court in *Griggs*; "Congress directed the thrust of the [Civil Rights] Act to the *consequences* of employment practices," the Court ad-

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[25] *Boston Chapter, NAACP, Inc.* v. *Beecher, supra* note 6, 504 F.2d at 1020; *Morrow* v. *Crisler*, 479 F.2d 960, 961-62 (5th Cir.), *aff'd on rehearing en banc*, 491 F.2d 1053 (1974); *Carter* v. *Gallagher, supra* note 2, 452 F.2d at 323; *Penn* v. *Stumpf*, 308 F.Supp. 1238, 1243 (N.D.Cal. 1970).

[26] *Bridgeport Guardians, Inc.* v. *Civil Serv. Comm'n, supra* note 2, 482 F.2d at 1335; *Chance* v. *Board of Examiners, supra* note 2, 458 F.2d at 1173; *Officers for Justice* v. *Civil Serv. Comm'n, supra* note 15, 371 F.Supp. at 1332-33 (N.D.Cal. 1973); *Smith* v. *East Cleveland, supra* note 15, 363 F.Supp. at 1146; *Castro* v. *Beecher*, 334 F.Supp. 930, 935 (D.Mass. 1971), *aff'd in part and remanded in part*, 459 F.2d 725 (1st Cir. 1972).

[27] See cases cited *supra* notes 25-26.

monished, "not simply the motivation."[28] Other courts have held that an employee challenging an employment practice as discriminatory need not prove a purpose on the employer's part to discriminate;[29] the only intent requirement is that the employer consciously perform the allegedly discriminatory act.[30] Thus it has been expressly held, and we agree, that efforts to recruit minority members have no bearing on a showing that an employment practice has a racially disproportionate impact.[31] Although the Department, quite commendably, has succeeded in increasing the proportion of black officers through vigorous efforts, it is self-evident that use of selection procedures that do not have a disparate effect on blacks would have resulted in an even greater percentage of black police officers than exists today.[32]

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[28] *Griggs* v. *Duke Power Co., supra* note 12, 401 U.S. at 432 (emphasis in original).

[29] *Boston Chapter, NAACP, Inc.* v. *Beecher, supra* note 6, 504 F.2d at 1021; *Bridgeport Guardians, Inc.* v. *Civil Serv. Comm'n, supra* note 2, 482 F.2d at 1336; *Vulcan Soc'y* v. *Civil Serv. Comm'n*, 360 F.Supp. 1265, 1272 (S.D.N.Y.), *aff'd in part and remanded in part*, 490 F.2d 387 (2d Cir. 1973); *Penn* v. *Stumpf, supra* note 25, 308 F.Supp. at 1244.

[30] *Hicks* v. *Crown Zellerbach Corp.*, 319 F.Supp. 314, 320 (E.D. La. 1970).

[31] *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 443 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); *Smith* v. *East Cleveland, supra* note 15, 363 F.Supp. at 1146; *Western Addition Community Organization* v. *Alioto*, 330 F.Supp. 536, 540 (N.D. Cal. 1971). See also *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1372-73 (5th Cir. 1974).

[32] The District Court noted that factors other than Test 21 may also have limited black recruitment. The court stated that many blacks pass Test 21 but fail to report for duty, "thus showing how a small a part the Test *per se* results in failure to recruit more blacks." 348 F.Supp. at 16-17. The record does show that only 48% of blacks who passed Test 21 between January 1, 1970 and September 4, 1970 reported for duty. Appellants' Appendix at 72-73 (affidavit of James M. Murray). The same evidence also reveals, however, that only 49% of the whites who passed Test 21 in the

The evidence this case lays bare is further corroborated by the "substantial body of evidence that black persons and other disadvantaged groups perform on the average far below the norm for whites on generalized intelligence or aptitude tests." [33] Judicial decisions on the "ever-extending series of challenges to civil service examinations" [34] unequivocally establish that blacks are test-rejected more frequently than whites.[35] This phenomenon is the result of the long history of educational deprivation, primarily due to segregated schools, for blacks.[36] Until arrival of the day when the effects of that deprivation have been completely dissipated, comparable performance on such tests can hardly be expected.

III. Job Relatedness of Test 21

As a result of appellants' showing that Test 21 has a disproportionate racial impact, there is a heavy burden on appellees to prove that the examination bears a demonstrable relationship to successful performance as a member of the Metropolitan Police Department.[37] Appellees contend that they have met this burden by establishing a direct relationship between applicants' scores on Test 21 and recruits' average scores on examinations given in the Department's Recruit School.[38]

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same period reported for duty. To attach any significance to the black failure is to ignore the fact that the same phenomenon occurs among whites. Furthermore, during the same time period, blacks comprised 72% of the applicants taking Test 21 in the District of Columbia, but only 56% of those who passed and 55% of all new officers reporting for duty. If the examination had no disparate effect, one would expect approximately 72%, rather than 55 or 56%, of the successful applicants to be black.

[33] *Arrington* v. *Massachusetts Bay Transp. Auth.*, 306 F.Supp. 1355, 1358 (D.Mass. 1969).

[34] *Kirkland* v. *State Dep't of Correctional Services*, 374 F.Supp. 1361, 1364 (S.D.N.Y. 1974).

[35] In every one of the more than twenty reported decisions involving this issue cited in this opinion, the final judicial result has encompassed a conclusion of racially disproportionate impact.

[36] *Griggs* v. *Duke Power Co.*, *supra* note 12, 401 U.S. at 430. See also *Gaston County* v. *United States*, 395 U.S. 285 (1969); *Hobson* v. *Hansen*, 269 F.Supp. 401, 419-21 (D.D.C. 1967), *aff'd sub nom.*, *Smuck* v. *Hobson*, 132 U.S.App.D.C. 372, 408 F.2d 175 (*en banc* 1969).

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[37] See text *supra* at note 15. The federal appellees intimated to the District Court that the issue of job relatedness must be reached in this case even in the absence of any showing of racially disproportionate impact. In their memorandum of points and authorities in support of their motion for summary judgment, they acknowledged that 5 U.S.C. § 3304(a) (1970) requires that examinations given pursuant to Civil Service Commission authority be job related. See D.C. Code § 4-103; Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 Colum. L. Rev. 691, 729 (1968). Appellants have not claimed that they have been deprived of any rights guaranteed by § 3304(a). Because appointments to the Metropolitan Police Department are generally subject to civil service rules, there is a serious question as to whether the validity of Test 21 should be determined by the Equal Employment Opportunity Commission regulations or by the Civil Service Commission regulations, which may be inconsistent with the EEOC guidelines. Compare 29 C.F.R. §§ 1607.1 *et seq.* (1973) (EEOC), with 5 C.F.R. §§ 300.101 *et seq.* (1974) (CSC). The EEOC guidelines have been followed in the decisions dealing with validation of employment tests, and have been recognized as controlling at least one circuit. *United States* v. *Georgia Power Co.*, 474 F.2d 906, 913 (5th Cir. 1973). See also *Griggs* v. *Duke Power Co.*, *supra* note 12, 401 U.S. at 433-34; *Castro* v. *Beecher*, *supra* note 2, 459 F.2d at 725; *Vulcan Soc'y* v. *Civil Serv. Comm'n*, *supra* note 6, 490 F.2d at 394 n.8; *Carter* v. *Gallagher*, *supra* note 2, 452 F.2d at 320; *Officers for Justice* v. *Civil Serv. Comm'n*, *supra* note 15, 371 F.Supp. at 1337; *Davis* v. *Washington*, *supra* note 1, 352 F.Supp. at 191. The EEOC guidelines have also been substantially adopted by the Office of Federal Contract Compliance. 41 C.F.R. §§ 60-3.1 *et seq.* (1974). In any event, the issue is largely academic in view of our holding in *Douglas* v. *Hampton*, No. 73-1376 (D.C. Cir.), decided today.

[38] For whites, 92% of the recruits with raw Test 21 scores over 60 averaged over 85 in Recruit School, 80% of white recruits who scored from 52 to 60 had that average, and 63% of white recruits who scored from 40 to 51 attained an 85 average. For blacks, 78% of the scorers over 60 achieved an 85 average, 70% of black recruits who scored from 52 to 60 had such an average, 54% of black re-

We are compelled to view the evidence presented by appellees in that regard with some skepticism. The assertion of predictive value of Test 21 for achievement in Recruit School is based upon a correlation between Test 21 scores and scores on written examinations given during a 17-week training course. We think this evidence tends to prove nothing more than that a written aptitude test will accurately predict performance on a second round of written examinations, and nothing to counter this hypothesis has been presented to us.[39] But despite serious doubt as to the probative value of the evidence,[40] we are willing to assume for purposes of this appeal that appellees have shown that Test 21 is predictive

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cruits who scored from 40 to 51 averaged over 85 in Recruit School. These figures yield a correlation of .46 for whites and .39 for blacks. Futransky Study, *supra* note 11, at 2. For the purposes of this appeal, we accept these figures as statistically significant. See *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra* note 6, 504 F.2d at 1024 n.13.

[39] Compare *Harper* v. *Mayor & City Council*, 359 F.Supp. 1187, 1202-03 (D.Md.), *modified and aff'd*, 486 F.2d 1134 (4th Cir. 1973), with *Pennsylvania* v. *O'Neill*, *supra* note 22, 348 F.Supp. at 1091. "[I]n many cases the apparent value of tests in predicting training success is spurious in that training success measured by scores on other paper and pencil tests. In order for tests to be meaningfully evaluated, training success must be measured by some sort of performance evaluation which demonstrates whether high scorers on the original test are actually able to learn more quickly or more effectively to perform the job or jobs in question, rather then simply to score well on a subsequent test." Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1649 (1969).

[40] The Recruit School examinations are not in the record, and there is no other basis in the record for confirming or disputing the hypothesis stated in text. Although the textual discussion questions whether appellees have met their heavy burden in this regard, we think it unwise to dispose of the case on that basis. It is uncertain whether any evidence could be generated to test the hypothesis, and to remand for consideration of the issue would not serve the interests of judicial economy in light of the overall result we reach in this case.

of further progress in Recruit School. The ultimate issue in this controversy then becomes whether that kind of proof is an acceptable substitute for a demonstration of a direct relationship between performance on Test 21 and performance on the job.

Appellees assert that their validity study[41] establishes that Test 21 is predictive of "trainability," and that therefore the examination survives the *Griggs* standard. Appellants, on the other hand, have convincingly argued that the record evidence does not demonstrate a sufficient relationship between Test 21 scores and trainability. All entrants into Recruit School pass the final examinations with a grade of 70 or above; if a particular candidate has difficulty, he is given assistance until he succeeds in passing the examinations.[42] The validity study revealed that persons with high Test 21 scores are more likely to achieve a final average exceeding 85 in Recruit School,[43] but there is no evidence to support the proposition that a candidate with an average below 85 is more difficult to train or will not be as good a police officer as a candidate with an average over 85.[44] Moreover, since applicants who scored below 40 on Test 21 have never been admitted to Recruit School, the validity study expressed no conclusion regarding the likely performance in Recruit School of Test 21 failures.[45] For these reasons,

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[41] Futransky Study, *supra* note 11.

[42] *Id.* at 1.

[43] *Id.* at 2. See note 38, *supra*.

[44] Indeed, the Futransky Study indicates that the contrary may be true. The study found no significant correlation between final Recruit School averages and job performance as measured by positive and negative incidents—commendation, appointment to a position of responsibility, below-average rating by supervisor, resignation with prejudice and disciplinary action. *Id.* at 5.

[45] *Id.* at 8. The difficulties in drawing any inference about job performance of failures solely from the performance of passers of

and because of the departmental policy that nobody fail Recruit School,[46] appellees have not shown that the admission of applicants who score below 40 on Test 21 into Recruit School would necessitate expanded training time[47] or produce Recruit School failures.[48] We might add that the Recruit School averages apparently have not been used by the Department for any purpose other than the attempt to validate Test 21 in this case.[49] The *Griggs* standard does not, in our opinion, permit validation by a criterion that the employer itself does not believe sufficiently job related.

Appellees maintain that there is support for their position in applicable legal precedents.[50] Claims similar

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an examination have been judicially noted. *Boston Chapter, NAACP, Inc.* v. *Beecher, supra* note 6, 504 F.2d at 1025; *United States* v. *Georgia Power Co., supra* note 37, 474 F.2d at 916. If appellees' study had demonstrated a positive correlation between low scores on Test 21 and failures in Recruit School, the data might have supported an inference that those who score below 40 on Test 21 are more likely to fail in Recruit School. No conclusion could be drawn in this regard, however, because there were no failures in Recruit School.

[46] *Davis* v. *Washington, supra* note 3, 348 F.Supp. at 16; Futransky Study, *supra* note 11, at 8.

[47] *Cf. Harper* v. *Mayor & City Council, supra* note 39, 359 F. Supp. at 123 n.38.

[48] *Cf. Pennsylvania* v. *O'Neill, supra* note 22, 348 F.Supp. at 1091.

[49] See *id.* at 1090 n.6.

[50] They first rely on a statement in *Spurlock* v. *United Airlines, Inc.*, 330 F.Supp. 228 (D.Col. 1971), *aff'd* 475 F.2d 216 (10th Cir. 1972), in which the court held the requirement of a college degree job related to aircraft piloting. The court found "a direct and substantial correlation between successful completion of the training program and a college degree." 330 F.Supp. at 235. Unlike the controlling force placed on Test 21 by the Metropolitan Police Department, however, the degree requirement was waived if an applicant had sufficient flight time, *id.* at 235; *cf. Griggs* v. *Duke Power*

to that have been made before, and the reported decisions on the point have uniformly rejected a correlation between entrance examination performance and training performance as a means of validating the entrance examination.[51] In a typical case, involving a written entrance examination given by the Philadelphia Police Department,[52] it was contended that the examination accurately predicted performance in the Department's Police Academy, as reflected in scores on Academy final written examinations.[53] The court refused to find the entrance test in that case job related for several reasons.

Co., supra note 12, 401 U.S. at 436; and the minimum flight time requirement was found to predict actual job performance. *Id.* at 235.

Other cases relied upon by appellees are also distinguishable. In *Castro* v. *Beecher, supra* note 26, there was no effort to relate test scores to training performance, 334 F.Supp. at 942; the court merely noted that the police department there involved had not even tried to make such a showing, *id.* at 942, and we see nothing intimating that the court would have held that a convincing showing of such a relationship validated the examination. Finally, in *Buckner* v. *Goodyear Tire & Rubber Co.*, 339 F.Supp. 1108 (N.D. Ala. 1972), *aff'd*, 476 F.2d 1287 (5th Cir. 1973), the court sustained a test that predicted performance in a training program, but held that the training program was the job: "there is a demonstrable relationship between the tests used and the job (*i.e.*, participation in the four year apprenticeship program) for which the tests are used." *Id.* at 1114. Apprentices in *Buckner* had their education subsidized by the employer, were on the payroll while being trained, and went through an 8000-hour four-year program at a cost to the employer of $36,000 per apprentice. The facts of the case at bar would not justify a similar finding; the cost of training an individual police recruit is hardly close to $36,000 and the training program is relatively short.

[51] *Officers for Justice* v. *Civil Serv. Comm'n, supra* note 15, 371 F.Supp. at 1337 (police officers); *Smith* v. *East Cleveland, supra* note 15, 363 F.Supp. at 1148-49 (police officers); *Harper* v. *Mayor & City Council, supra* note 39, 359 F.Supp. at 1202-03 (firemen); *Pennsylvania* v. *O'Neill, supra* note 22, 348 F.Supp. at 1090-91 (police officers).

[52] *Pennsylvania* v. *O'Neill, supra* note 22.

[53] *Id.* at 1090.

There was no correlation between Academy performance and effective job performance;[54] there was no showing that the Academy examinations were significantly different from the entrance exams, so the correlation might merely have indicated that the entrance examination predicated good scores on a second written test;[55] and there was no showing that applicants who failed the entrance examination would not do well in the Academy.[56] As further support for its conclusion, the court noted that no one had failed in the Academy in the past five years.[57] The similarity between that case and the case at bar is indeed striking, and the same result has been reached by at least three other courts.[58]

Appellees further argue that convincing proof that an employment selection procedure, even one with a racially disproportionate impact, accurately predicts trainability might in some cases satisfy the *Griggs* standard.[59] Ap-

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[54] *Id.* See note 44, *supra.*

[55] *Id.* at 1091. See note 40, *supra.*

[56] *Id.* See text *supra* at note 45.

[57] *Id.* See text *supra* at note 46.

[58] See cases cited note 51, *supra.*

[59] Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1970), is the authority asserted by appellees for this proposition. They refer to a statement by Senator Tower, the author of § 703(h), that the provision would allow employers to "give general ability and intelligence tests to determine the trainability of prospective employees." 110 Cong.Rec. 13,492 (1964). A decision as to whether § 703(h) permits validation by correlation to trainability, rather than job performance, is not a simple or insignificant endeavor. One professional commentator notes that "from validation studies of tests with training criteria, one must generalize with great caution about the validity of those tests for [job] proficiency. . . . [T]he abilities and traits which are important for success in training are not very similar to those which determine success in the performance of the actual job." E. Ghiselli, The Validity of Occupational Aptitude Tests 119 (1966). We decline

pellees have not, however, proffered such proof, nor have they persuaded us that trainability could be a proper criterion for validating Test 21. As long as no one with a score below 40 enters Recruit School, as long as all recruits pass Recruit School, as long as the Department's actions concede that Recruit School average has little value in predicting job performance, and as long as there is no evidence of any correlation between the Recruit School average and job performance, we entertain grave doubts whether any of this type of evidence could be strengthened to the point of satisfying the heavy burden imposed by *Griggs.*

IV. Conclusion

The dissent is concerned, as are we, with preservation of the Department's ongoing efforts to improve its professional standards.[60] The District Court declined to read the controlling legal principles so that "brakes [would] be placed upon efforts to upgrade recruiting and job standards in law enforcement work."[61] The court apparently believed that the relief sought by appellants would necessarily lower recruitment standards and produce "a setback for blacks and whites alike."[62] We believe these fears are not well founded. Elimination of Test 21 could result in lower standards only if it were

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to express any opinion on the merits of this issue on these facts, for appellees have not proved a case that presents the question.

We do note, however, that the legislative history of the 1972 amendments to Title VII of the Civil Rights Act of 1964, see note 2, *supra*, reveals congressional concern over use of general ability tests in hiring and promotion by the Civil Service Commission. H.R. Rep. No. 238, 92d Cong., 1st Sess. 24 (1971).

[60] See *Davis* v. *Washington*, *supra* note 3, 348 F.Supp. at 17. But see *Pennsylvania* v. *O'Neill*, *supra* note 22, 348 F.Supp. at 1103.

[61] *Davis* v. *Washington*, *supra* note 3, 348 F.Supp. at 17.

[62] *Id.* at 18.

job related, and appellees have not come forward with satisfactory evidence that Test 21 is job related. The common sense theory of validity espoused by the dissent is clearly an inadequate response to appellants' proof of racially disproportionate impact.[63] The rationale is equivalent to a finding of construct validity without satisfying the prerequisites delineated in *Douglas* v. *Hampton*.[64]

Appellants' complaint sought both declaratory and injunctive relief. They are, as a matter of law, entitled to a declaration that Test 21 is invalid, and the conclusions we reach have in other cases served as the basis for enjoining the administration of entrance examinations and ordering affirmative relief.[65] The focus here, however, has been on the substantive issues, and the record lacks the factual development essential to a sound determination as to whether an injunction against use of Test 21 is warranted. We leave that question open to consideration by the District Court, mindful that declaratory relief in accordance with this opinion might, in

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[63] See *Douglas* v. *Hampton*, *supra* note 37, at 15. The dissent correctly notes that *Griggs* involved a distinguishable job situation, but many subsequent decisions have followed the same analysis when dealing with police officers and fire personnel. See cases cited notes 25, 26 & 29, *supra*, and note 65, *infra*.

[64] There has been no attempt to establish that proof of the empirical validity of Test 21 is not feasible. See *Douglas* v. *Hampton*, *supra* note 37, at 18-19. Perhaps more importantly, there is no evidence that directly relates the constructs of Test 21 to job performance. See *id.* at 17-18. In the absence of such evidence, general concepts of common sense are inadequate aids to meaningful analysis of the crucial issues in this case.

[65] *E.g.*, *United States* v. *Chicago*, *supra* note 6, 385 F.Supp. at 561; *Officers for Justice* v. *Civil Serv. Comm'n*, *supra* note 15, 371 F.Supp. at 1342; *Smith* v. *East Cleveland*, *supra* note 15, 363 F.Supp. at 1152; *Harper* v. *Mayor & City Council*, *supra* note 39, 359 F.Supp. at 1218; *Pennsylvania* v. *O'Neill*, *supra* note 22, 348 F.Supp. at 1104.

consequence of agreement by the parties or otherwise, obviate any need for the coercion of an injunction.[66]

The judgment of the District Court is reversed. Appellants' motion for partial summary judgment must be granted,[67] and appellees' respective motions for summary judgment denied.[68] The case is remanded to the District Court for entry of appropriate orders, and determination and effectuation of a suitable remedy, in harmony with this opinion.

ROBB, *Circuit Judge*, *dissenting*: I would affirm the judgment of the District Court on the opinion of Judge Gesell, reported as *Davis v. Washington*, 348 F.Supp. 15 (D.D.C. 1972). I add a few words.

The majority finds that Test No. 21, designed to measure verbal ability, is invalid because it is not "job related"; but the majority does not discuss the content of Test No. 21. To remedy this omission I attach a copy of the 1970 test, which is in the open record before us (J.A. 145), as an appendix to this dissent. The record also discloses (J.A. 46) that a passing rating of 70 is achieved if forty of the eighty questions are answered correctly.

As I see it, the premise of the majority opinion is either that Test No. 21 is not a fair test of the verbal

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[66] Cf. *Steffel* v. *Thompson*, 415 U.S. 452, 461 (1974); *Samuels* v. *Mackell*, 401 U.S. 66, 73 (1971).

[67] The motion was for a partial summary judgment because it did not involve the promotion issues. See note 1, *supra*.

[68] We note that the District Court granted the federal appellees' motion and also dismissed the action as to them, while it did not dismiss as to District appellees. It is unclear why this difference exists, and we intimate no view as to the propriety of the dismissal on grounds not discussed in this opinion.

ability required of a policeman, or that verbal ability is not related to a recruit's performance in the Police Academy and thereafter as a policeman. I disagree on both counts.

As the District Court recognized, modern law enforcement is a highly skilled professional service. In school and thereafter in practice a policeman must learn and understand intricate procedures. He must understand a myriad of regulations, statutes and judicial rulings, and he will be called upon to apply them in his daily work. He must be able to present relevant facts in literate, clear and precise reports. When he testifies in court he must be articulate. He cannot achieve these goals unless he has a basic understanding of the English language and the meaning of words and the ability to perceive the import of written sentences. In short, issuing a badge and a gun to a semi-literate cannot transform him into a competent police officer. As the district judge put it "[t]he ability to swing a nightstick no longer measures a policeman's competency for his exacting role in this city." 348 F. Supp. at 17.

In my judgment Test No. 21 on its face is a fair and reasonable test of the ability of a police recruit to measure up to the qualifications I have outlined. In other words, I think it is "job related" on its face. Certainly I cannot believe that one who fails to answer half of the questions correctly has the verbal ability and understanding to qualify for admission to the Police Academy and thereafter for membership in the Police Department. Although the majority rejects this reasoning, which it rightly calls a "common sense theory", I adhere to the conviction that common sense in a judicial decision is not out of place.

The majority notes that the disproportionate rate of failure among blacks "is the result of the long history

of educational deprivation, primarily due to segregated schools for blacks." That this should be true is deplorable, but it does not follow that one who cannot pass the test is qualified to become a police officer.

Griggs v. Duke Power Co., 401 U.S. 424 (1971), much relied upon by the majority, involved tests for admission into the Coal Handling, Operations, Maintenance and Laboratory and Test Departments of a public utility. The Court found that the tests were not "directed or intended to measure the ability to learn a particular job or category of jobs", (401 U.S. at 428) and that they were therefore invalid. I think the distinction between those tests and jobs and the test and job in our case is obvious. The job of a policeman is quite different from the jobs involved in the *Griggs* case. Test No. 21 is intended to measure the ability to fulfill the duties of a policeman and I think it fairly does so. Perhaps it would not fairly measure ability to succeed in coal handling for a public utility, but that is not its purpose.

We are often told by knowledgeable commentators and critics that the standards for admission to membership in the Police Department must be raised and maintained at a high level. I agree with this proposition. In my judgment the majority opinion is a step backward that will lead to debasing the quality of our police force.

I respectfully dissent.

APPENDIX

Test No. 21

Series No. 173

February 1970

Print Name _____
Last Name *First Name* *Middle Initial*

Date of Birth _____ Identification No. _____
Month Day Year

UNITED STATES CIVIL SERVICE COMMISSION

Fill in the identifying blanks at the top of the answer sheet and test booklet. Place no other identifying marks on your answer sheet and test booklet.

The questions in this test need not be taken up in order. Answer first those that you can answer without any delay. Then use the remainder of the time on the questions you have passed over.

For each question, select the BEST ANSWER, and darken the space on the answer sheet that bears the same letter as the answer.

1. ORDINARY means most nearly
   A) uncommon
   B) worthless
   C) usual
   D) tiresome
   E) lasting

2. SMILE is related to HAPPINESS as FROWN is related to
   A) surprise
   B) ridicule

   C) face
   D) displeasure
   E) inquiry

3. Laws restricting hunting to certain regions and to a specific time of the year were passed *chiefly* to
   A) prevent people from endangering their lives by hunting
   B) keep our forests more beautiful
   C) raise funds from the sale of hunting licenses
   D) prevent complete destruction of certain kinds of animals
   E) preserve certain game for eating purposes

4. The saying "All things are easy that are done willingly" means most nearly
   A) Work undertaken without reluctance proceeds smoothly.
   B) To the lighthearted all things are easy.
   C) Many hands make light work.
   D) Easy things are done willingly.
   E) Everyone likes a cheerful worker.

5. PECULIARLY means most nearly
   A) calmly
   B) stubbornly
   C) wonderingly
   D) sensibly
   E) strangely

6. (*Reading*) "Dates are the fruit of a species of palm tree which ranges from the Canary Islands through northern Africa and the southeast of Asia to India. These trees have been cultivated and their fruit much prized throughout most of these regions from remotest antiquity. In Arabia date palms are an important source of national wealth, and their fruit forms the staple article of food in the country."

The quotation best supports the statement that date palms

A) are the chief source of wealth in many countries
B) have long been valued as a source of food
C) were first grown in the Canary Islands and Africa
D) were not prized for their fruit in early times
E) cannot be grown in other than tropical climates

7. SKETCHING is related to PEN as PHOTOGRAPHY is related to
A) brush
B) camera
C) picture
D) pose
E) studio

8. The *best* reason, of the following, for requiring that ballots be marked in secret is that
A) this provides for a permanent record of results
B) the results are thus unknown until voting is over
C) the vote is intended to indicate the real opinion of the voter
D) this permits several matters to be voted on at the same time
E) this is the established custom of our country

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[End of page]

9. BOUNTY means most nearly
A) generosity
B) limit
C) service
D) fine
E) duty

10. Strands of fiber used in a rope are twisted or braided together *chiefly* in order to make the rope

A) more flexible
B) less expensive
C) unbreakable
D) more rigid
E) stronger

11. CANOE is related to PADDLE as STEAMSHIP is related to
A) wharves
B) propeller
C) water
D) routes
E) yard

12. The saying "no gains without pains" means most nearly
A) Progress is made only at the expense of effort.
B) The lazy man rarely reaches his goal.
C) One cannot always be certain that results will justify his efforts.
D) Achievement without toil deserves little appreciation.
E) To plan one's work is to hasten its completion.

13. The purpose of trademarks is to
A) show that a tax has been paid
B) distinguish the brand of goods manufactured
C) show that a patent has been granted
D) indicate that goods are unadulterated
E) distinguish home from foreign products

14. CRISP means most nearly
A) broken
B) frosty
C) brittle
D) burnt
E) dry

15. (*Reading*) "The practical skill of primitive man became, in time, quite admirable in the treatment of certain kinds of disease and even more so in surgery.

Examples of his accomplishments may be seen today, among primitive tribes, and, together with prehistoric remains, testify to the status of medicine before history was written."

The quotation best supports the statement that primitive man

A) lacked knowledge of surgery
B) exhibited more skill in medicine than in surgery
C) was not easily affected by disease
D) developed a definite skill in dealing with physical ailments
E) buried complete records of his ability

16. WEED is related to PLANT as FLY is related to
A) screen
B) disease
C) insect
D) food
E) spider

17. The saying "A drowning man will catch at a straw" means most nearly
A) Help sometimes comes after we have abandoned all hope of it.
B) Great effort is necessary to overcome great difficulties.
C) He who relies on too slim a chance is lost.
D) A man will try anything as a last resort.
E) No disaster is entirely without remedy.

18. SCARCELY means most nearly
A) minutely
B) fittingly
C) partially
D) precisely
E) barely

19. (*Reading*) "A great many small mammals, and not a few of considerable size, have developed the arboreal habit. Most climbing forms have taken to the trees for food, and perhaps even more important, to escape terrestrial enemies which would readily overcome them had they not evolved climbing habits. The only entirely tree-living mammals, however, are confined to the tropics."

The quotation best supports the statement that tree-living mammals

A) are afraid to descend to the ground
B) have to be small to find sufficient food in trees
C) damage trees by consuming the leaves
D) developed climbing habits as a matter of necessity
E) are confined to small, tropical animals

20. GARDEN is related to FLOWER as LAKE is related to
A) pool
B) river
C) beach
D) cottage
E) fish

21. PERTURBED means most nearly
A) agitated
B) distrustful
C) impelled
D) repulsed
E) unmoved

22. The saying "To believe a thing impossible is a way to make it so" means most nearly
A) It is unwise to begin what is beyond one's ability.
B) The only way to prove a thing can be done is to do it.

C) We can do whatever we think we can do.
D) What is easy to obtain is not worth having.
E) Lack of confidence leads to failure.

23. SPEAK is related to SHOUT as DAMAGE is related to
A) sue
B) repay
C) destroy
D) condemn
E) repair

24. (*Reading*) "Men who have good mechanical ability, and especially those who have had some experience in mechanical work, will, when they show their worth, be detailed as helpers in machine shops and engine rooms, where opportunity will be given them for acquiring training with machinists' tools."

The quotation best supports the statement that the qualifications for helpers in machine shops and engine rooms must include
A) the demonstration of mechanical ability or training
B) special experience in mechanical work
C) training with machinists' tools
D) previous apprenticeship on the job
E) similar duties in previous positions

25. Of the following reasons, the one that *best* explains the continued sale of records in spite of the popularity of the radio is that the
A) records make available the particular selections desired when they are desired
B) appreciation of records is more wide-spread than appreciation of radio
C) collection of records provides an interesting hobby
D) newest records are almost unbreakable
E) sound effect of records is superior to that of the radio

26. The saying "The fire in the flint shows not till it is struck" means most nearly
A) One should be prompt to recognize one's opportunities.
B) The first attempt is not always successful.
C) Unless abilities are demonstrated, they remain unrecognized.
D) There is a proper time for everything to be done.
E) Only by repeated efforts can skill be achieved.

27. ISOLATION is related to COMPANIONSHIP as DESPAIR is related to
A) despondency
B) success
C) strength
D) recovery
E) hope

28. The saying "Straight trees are the first to be felled" means most nearly
A) Honest effort is always rewarded.
B) The best are the first chosen.
C) Ill luck passes no one by.
D) The highest in rank have farthest to fall.
E) The stubborn are soon broken.

29. SUN is related to HEAT as FOG is related to
A) moisture
B) twilight
C) storm
D) winter
E) evening

30. (*Reading*) "The Pure Food and Drugs Act would be totally incapable of enforcement were it not for the fact that chemists have perfected methods of invesitgation whereby the claims of composition of various foods and drugs can be verified or exposed. The Government has an ever-watchful force of

'chemist detectives' trying to protect the Nation's health in respect to remedies sold to the public."

The quotation best supports the statement that Government chemists

A) prosecute violators of the Pure Food and Drugs Act
B) improve the quality of foods and drugs
C) discourage the sale of patent medicines
D) tests the chemical composition of foods and drugs
E) have considerably improved the health of the Nation

31. To DEVIATE means most nearly to
A) intend
B) vary
C) steer
D) enlarge
E) return

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[End of page]

32. BECAUSE is related to REASON as THEREFORE is related to
A) result
B) heretofore
C) instinct
D) logic
E) antecedent

33. The saying "Do not make the bite larger than the mouth" means most nearly
A) Do not attempt to do work which you do not enjoy.
B) Magnifying one's difficulties makes one less able to overcome them.
C) Those who want too much are never satisfied.
D) An individual should not attempt a task which is beyond his capacity.

E) It is unwise to indulge one's appetite.

34. (*Reading*) "Although the types of buildings in ghetto areas vary from the one-story shack to the large tenement building, they are alike in that they are all drab, unsanitary, in disrepair, and often structurally unsound."

The quotation best supports the statement that all buildings in ghetto areas are
A) overcrowded
B) undesirable as living quarters
C) well-constructed
D) about to be torn down
E) seldom inspected

35. Which of the following is the *chief* reason that posters placed in busses are a successful medium of advertising?
A) Their bright colors and pictures attract attention.
B) They can be understood by children.
C) They are an inexpensive method of advertising.
D) All passengers are in a receptive mood when riding in such vehicles.
E) They reach a working, and therefore consuming, public.

36. To RETRENCH means most nearly to
A) impede
B) replace
C) counteract
D) attack
E) curtail

37. BRAKE is related to MOTION as DAMPER is related to
A) draft
B) furnace

C) accelerator
D) chimney
E) humidity

38. The saying "The good seaman is known in bad weather" means most nearly
A) Everyone has an opportunity to show his ability.
B) Skill is chiefly a matter of practice.
C) People seldom complain when things run smoothly.
D) One's skill becomes apparent in times of stress.
E) No one can do his best under certain conditions.

39. (*Reading*) "Brass is an alloy consisting mainly, if not exclusively, of copper and zinc, but in its older use the term was applied rather to alloys of copper and tin, now known as bronze. It is quite likely that from very early times brass was made accidentally, owing to the mixture of zinc ores with those of copper, but was not recognized as distinct from bronze. One of the earliest examples of Roman brass is a coin made in 20 B.C., containing 17.3 percent zinc."

The quotation best supports the statement that
A) brass developed somewhat earlier than did bronze
B) bronze and brass have one essential ingredient in common
C) the earliest known coins were made from brass
D) alloys of copper and zinc are now known as bronze
E) bronze and brass were first made by the Romans

40. The saying "A little knowledge is a dangerous thing" means most nearly
A) It is better to be ignorant than to know too much.
B) No one knows so much but that he could know more.

C) Those who know the least usually do the most talking.
D) To know a little about many things is to know nothing well.
E) Incomplete information may have unfortunate results.

41. ARTIFICIAL means most nearly
A) disguised
B) awkward
C) genuine
D) unnatural
E) useless

42. FRAME is related to PICTURE as MARGIN is related to
A) edge
B) decoration
C) page
D) border
E) width

43. (*Reading*) "There are two basic types of silent reading. In one type, called cursory reading, the reader does not try to grasp the meaning of every word but only the essential concept. The other form of silent reading is careful and exact. In the latter type, detailed attention is required in order to assimilate the complete thought. Cursory reading is a valuable tool, but much of the reading required in business must be careful and exact. Too often, people who have become habituated to cursory reading cannot adapt themselves to careful reading."

The quotation best supports the statement that the businessman
A) cannot afford to read so rapidly as to miss the fine points of the matter read

B) is required to relearn his whole method of silent reading
C) must do so much reading that he does not take time to read carefully
D) soon becomes highly skilled in reading with speed as well as with accuracy
E) fails to realize the need for becoming adept in the two basic types of silent reading

44. The saying "Nothing ventured, nothing gained" means most nearly
A) Persistent effort brings success.
B) Cooperation is vital to achievement.
C) A certain amount of risk is required to win anything.
D) Success attained without effort is not enduring.
E) Success encourages continued effort.

45. (*Reading*) "A sudden brief heavy rain will penetrate the soil less than the same amount of water falling for a longer period, since it takes time for water to expell the soil air and work its way downward among the soil particles. The downward movement is hastened by soil cracks, roots, root paths, and the holes of burrowing animals."

The quotation best supports the statement that penetration of the soil by rain
A) is rapid as soon as the soil air is expelled
B) is affected by the intensity of the rainfall
C) depends on the amount rather than the duration of rainfall
D) is affected more by the amount of vegetation than by other soil conditions
E) is affected only slightly by the presence of soil cracks

46. SKEPTIC means most nearly
A) guide
B) enthusiast
C) mystic
D) doubter
E) exile

47. ACCIDENT is related to NEGLIGENCE as SAFETY is related to
A) indifference
B) appliance
C) security
D) danger
E) carefulness

48. (*Reading*) "A brush properly selected for the job at hand will not only make the application of paint easier but will also add to the appearance of the finished surface by increasing its smoothness. Brushes with medium or long bristles and therefore reduce the number of times the brush is dipped into the paint, thus saving time. Longer bristles are more flexible and insure a smoother application."

The quotation best supports the statement that in painting a house
A) choice of the correct type of brush is the most important step
B) frequent dipping of the brush into the paint will cause much waste
C) use of a thin paint tends to make the job shorter and easier
D) best results are likely to be achieved by using a brush with long bristles
E) a smooth finish is hard to get with a soft brush

49. The saying "Muddy springs will have muddy streams" means most nearly

A) A bad ending does not always follow a bad beginning.
B) No effort should be made to improve what is worthless.
C) Causes are usually less important than results.
D) Good cannot come out of evil.
E) What cannot be corrected must be accepted.

50. (*Reading*) "When minerals split easily with smooth faces in certain directions, they are said to have the property of cleavage. Some minerals having the property of cleavage, like quartz, when struck a blow, will break into fragments of various shapes; others, like calcite, break into fragments each of the same general shape."

The quotation best supports the statement ihat when minerals are broken into fragments
A) the size of the fragments shows whether the mineral possesses cleavage
B) the smoothness of the surfaces of the fragments reveals the skill of the worker
C) the manner in which the mineral breaks shows if the mineral possesses cleavage
D) many of the fragments are more beautiful than the original piece of material
E) those minerals possessing cleavage to a high degree break into fragments similar in shape

51. IMPERTINENCE means most nearly
A) impatience
B) briskness
C) conceit
D) curiosity
E) incivility

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[End of page]

52. The saying "Habits are at first cobwebs, at last cables" means most nearly
A) Good work habits make any task easier.
B) Habits grow stronger with time.
C) It is sometimes difficult to acquire good habits.
D) Bad habits are the hardest to break.
E) Good habits should be acquired early in life.

53. (*Reading*) "Illustrations should really illustrate; too often they are simply photographic inserts to help sell the book. They should develop from and enliven the text and be so much a part of the book that they harmonize with it in spirit and in appearance. Moreover, they should be placed as nearly as possible next to or opposite the paragraph or page illustrated and not scattered at random through the book with a consequent loss of interpretative value."

The quotation best supports the statement that the illustrations of a book
A) should be grouped rather than scattered through the book
B) increase sales appeal only when they truly illustrate
C) should be photographs taken from real life
D) may be of more value to the reader than is the text
E) should serve to add interest to the text

54. A tenant who holds a long-term lease on a building will be *most likely* to gain by the transaction if during the period covered by the lease
A) business rentals vary considerably
B) real estate becomes cheaper
C) prices in general are increased
D) living costs are lowered
E) the tax rate is decreased

55. (*Reading*) "Although metals may occur in nature as pure native metal, they are more commonly found in combination with other materials in an ore. An ore is a metal-bearing substance from which a metal, alloy, or metallic compound can be extracted at a profit."

The quotation best supports the statement that

A) an ore contains other materials in addition to metal
B) few metals occur in a pure form in nature
C) the extraction of metal from an ore is an expensive process
D) some metals are not mined because the cost of extraction is prohibitive
E) metals found in ores do not occur in nature as pure native metals

56. DISPARAGEMENT means most nearly
A) depreciation
B) distinction
C) idealization
D) jealousy
E) reputation

57. The saying "Other times, other customs" means most nearly
A) Change is more frequent today than in the past.
B) Modes of living change with the times.
C) Tolerance is a virtue in every society.
D) Certain values have remained constant for centuries.
E) The ideals of civilization are becoming continually higher.

58. (*Reading*) "Individuals develop personality characteristics on the basis of their innate physiological equipment, the experiences which beset them from birth on, and their relationships with other human

beings and with the social institutions that surround them."

The quotation best supports the statement that the formation of personality
A) is affected as much by physique as by environment
B) becomes evident at an earlier age in some persons than in others
C) is based on certain factors outside the control of the individual
D) determines the types of persons with whom an individual will associate
E) is based on hereditary factors rather than social experiences

59. PLACIDITY means most nearly
A) ignorance
B) serenity
C) solitude
D) timidity
E) freedom

60. NEWS is related to INFORM as ARGUMENT is related to
A) understand
B) convince
C) defy
D) entertain
E) deceive

61. To CAREEN means most nearly to
A) hurry
B) thrust
C) quiver
D) jostle
E) lurch

62. RUBBISH is related to DISCARD as TREASURE is related to
A) share
B) discover
C) cherish
D) lose
E) worry

63. The saying "They wrangle about an egg and let the hens fly away" means most nearly
A) They dispute at every opportunity.
B) Attention to details is important.
C) Arguing is seldom worth while.
D) They have a poor sense of values.
E) A grasping person has few friends.

64. (*Reading*) "Adhering to old traditions, old methods, and old policies at a time when new circumstances demand a new course of action may be praiseworthy from a sentimental point of view, but success is won most frequently by facing the facts and acting in accordance with the logic of the facts."

The quotation best supports the statement that success is attained through
A) recognizing necessity and adjusting to it
B) using methods that have proved successful
C) exercising will power
D) remaining on a job until it is completed
E) considering each new problem separately

65. The saying "The first blow is as much as two" means most nearly
A) He who takes the initiative gains a distinct advantage.
B) One hard blow is more effective than numerous lighter ones.
C) In any struggle the stronger participant makes the first move.

D) The wise man takes advantage of every opportunity.
E) He who strikes first will win the battle.

66. To EVINCE means most nearly to
A) claim without good reason
B) state with certain reservations
C) show in a clear manner
D) follow against one's will
E) deny in an indirect fashion

67. INSERT is related to REMOVE as INTRUDE is related to
A) interrupt
B) withdraw
C) conceal
D) disclaim
E) enter

68. (*Reading*) "Fireboats should be of light draft for harbor work, and the larger sizes should be equipped with twin screws for quick turning. Boats of recent construction have steel hulls and steel deck houses; plank-covered decks are preferable to metal, as steel decks are slippery."

The quotation best supports the statement that fireboats must be
A) entirely fireproof
B) built of wood
C) of recent construction
D) all of the same size
E) capable of quick movement

69. In installing fire hydrants, a city should make sure that the outlets are of the same standard thread as those in adjacent cities *chiefly* because
A) in emergencies it is sometimes necessary to borrow fire apparatus from neighboring cities

B) one set of apparatus will do for several cities
C) the same repairman can be utilized by several cities
D) small cities are dependent on the larger cities for fire-extinguishing service
E) unused equipment can be returned to dealers

70. TENACIOUS means most nearly
A) boisterous
B) obstinate
C) industrious
D) inseparable
E) honorable

71. AMPLIFIER is to HEARING as TELESCOPE is to
A) astronomy
B) lens
C) sight
D) mirror
E) sound

GO ON TO THE NEXT PAGE

[End of page]

72. The saying "Blind zeal only does harm" means most nearly
A) People are not likely to devote their best efforts to work they do not understand.
B) Appearances should not affect one's attitude.
C) It is difficult to pretend enthusiasm in a hopeless case.
D) At times we must let others do the leading.
E) Enthusiasm ought to be rightly directed.

73. PROMONTORY means most nearly
A) marsh
B) monument
C) headland
D) boundary
E) plateau

74. (*Reading*) "Soldering is the binding together of two or more metals by means of a fusible alloy of tin and lead called solder. The solder used in the operation must melt at a lower temperature than the metals being joined together. However, the nearer the melting points of the solder and the soldered metals, the stronger the completed joint."

The quotation best supports the statement that the melting points of metals being soldered should be
A) identical with the melting point of the solder
B) identical with each other
C) high enough to permit a strong joint
D) lower than the melting point of tin or of lead
E) higher than the melting point of the solder

75. VIVID means most nearly
A) rare
B) intense
C) imaginary
D) absurd
E) attractive

76. NOTE is related to MESSAGE as PICTURE is related to
A) scene
B) camera
C) artist
D) frame
E) gallery

77. An EXIGENCY means most nearly
A) an undue hurry in acting
B) a series of misfortunes
C) an act causing disorder
D) a case demanding urgent action
E) a task requiring specific skills

78. The saying "That is well spoken which is well taken" means most nearly
   A) Sensitive people are quick to imagine insults.
   B) To accept reproof meekly shows nobleness of spirit.
   C) The way in which a remark is received demonstrates its appropriateness.
   D) He who ignores one insult will receive many others.
   E) He who laughs at his own expense has few enemies.

79. (*Reading*) "When the snow of one winter does not entirely melt during the summer but is added to that of the following winter, there is a gradual accumulation of snow which may result in a glacier. The lower layers are compressed into ice by the weight of the overlying snow and the mass in time begins to spread. The glaciers move downward, following the valleys and ravines, until they reach a point at which the rate of melting equals or exceeds the rate of ice advance."

   The quotation best supports the statement that glaciers
   A) cease advancing only upon the arrival of summer
   B) move very slowly even on steep slopes
   C) move downward and forward until checked by warmth
   D) form in all areas that are cold and snowy
   E) cover great distances in their advance each year

80. The saying "Anger dies quickly with a great man" means most nearly
   A) A good man is slow to anger.
   B) Nothing ruffles a good disposition.
   C) One can forgive but not forget.

   D) Strong passions cannot last.
   E) To continue to bear malice is petty.

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ORDER

[Filed March 3, 1975]

It is ORDERED, *sua sponte*, that the majority opinion filed herein on February 27, 1975, be and hereby is amended as follows:

1. By deleting the first full paragraph on page 6 and inserting in lieu thereof the following:

> The District Court ruled that appellants' showings (a) that the number of black police officers in the Department is not proportionate to the population mix of the District, (b) that a higher percentage of blacks fail Test 21 than whites, and (c) that Test 21 has not been validated to show its reliability for measuring job performance, shifted the burden of proof to appellees.[17] We reach the same conclusion on the basis of the racially disproportionate impact that Test 21 is shown to have.[18] The District Court further ruled, however, that Test 21 is exonerated by a direct and reasonable relationship to the requirements of the Department's police training program.[19] We deem that insufficient, and finding Test 21 not otherwise demonstrated to be job related, we hold that appellees have not met their burden.[20]

2. By changing the number of footnote 19 on page 6 to 20.

3. By inserting a new footnote 19 on page 6 as follows:

> [19] *Davis* v. *Washington*, *supra* note 3, 348 F.Supp. at 17.

4. By deleting the second sentence of the first paragraph on page 7 and the accompanying footnote.

5. By changing the number of footnote 20 on page 7, and the reference to it in text, to 21.

MEMORANDUM OPINION AND ORDER

[Filed July 31, 1972]

This is a class action brought by several black police officers and rejected black applicants for employment as police officers who generally allege that the Metropolitan Police Department discriminates against blacks in its recruiting and promotions in violation of the Fifth Amendment to the Constitution of the United States and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000(e)). Injunctions, damages and other affirmative relief are sought. There has been considerable informal discovery under arrangements approved by the Court at several pretrials. The recruiting aspects of the case are now before the Court on separate motions for summary judgment filed by plaintiffs and by both the federal and District of Columbia government defendants. The parties have supported their motions with statistical information not in dispute and affidavits. Detailed briefs in support of the respective positions were furnished.

In the District of Columbia, a police officer is accepted as a recruit and enters an intensive 17-week police academy training period if he meets acceptable character and physical standards, is a high school graduate or equivalent and receives a grade of at least 40 percent on Test 21. This Test is an examination that is used generally throughout the federal service. It was developed by the Civil Service Commission, not the Police Department, and is designed to test verbal ability, vocabulary, reading and comprehension.

The claims of discrimination in recruiting here advanced are directed solely to the Test. Plaintiffs do not allege an intentional discrimination or purposeful discriminatory acts. Rather they contend that the Test bears no relationship whatsoever to job performance,

has a highly discriminatory impact in screening out black candidates and should be replaced.

Plaintiffs show that:

(a) The number of black police officers, while substantial, is not proportionate to the population mix of the city.

(b) A higher percentage of blacks fail the Test than whites.

(c) The Test has not been validated to establish its reliability for measuring subsequent job performance.

This showing, while minimal, will be accepted as sufficient to shift the burden of the inquiry to defendants and accordingly it must be determined whether the undisputed facts before the Court on these motions establish grounds for any remedies sought.

Police Chief Wilson took office August, 1969, and the recruiting of police officers has dramatically changed during his tenure. Since he took office, 44 percent of new recruits accepted for the police force have been black. Once an officer is recruited he is not washed out during the subsequent intensive training period at the academy but rather is given special assistance, where needed, to assure success. Thus this percentage reflects the number of black officers actually enrolled on the force. There is no legal requirement that a recruit be a resident of the District of Columbia. The urgent need to enroll additional officers has required recruiting beyond the confines of the District. Apart from one national effort, the recruiting effort has focused primarily on an area within a 50-mile radius of the center of the city. While there are no precise figures in the record, 44 percent black obviously closely approximates the population ratio for the eligible 20-29 age group in this wider area. A detailed survey of recruiting in the period January, 1970,

to September, 1970, shows that more than 50 percent of officers recruited were black.

There is no proof that the Test is the only factor limiting black recruitment. Many blacks, numbering in the hundreds, passed the Test but for other reasons failed to report for duty, thus showing how small a part the test *per se* results in failure to recruit more blacks.

There is undisputed positive proof that the Department has followed a vigorous, systematic and persistent affirmative effort to enroll black policemen. The relatively higher percentage of black test failures must be appraised by taking into account this all-out effort to generate applications from blacks which may well have encouraged applicants with educational deficiencies to apply.

Thus the issue boils down to the merits of plaintiffs' contention that the Test is not related to job performance and to defendants' assertion that regardless of this relationship the Test is directly related to a determination whether the applicant possesses sufficient skills requisite to the demands of the curriculum a recruit must master at the police academy.

Plaintiffs and their expert affiants have misconceived the responsibilities and expertise required of modern police officers in a large metropolitan city such as the Nation's Capital. Study of the syllabus of the training course readily demonstrates the intricacy of police procedures, the emphasis on report writing, the need to differentiate elements of numerous offenses and legal rulings, and the subtleties of training required in behavioral sciences and related disciplines. Daily the significance of these skills demanding reasoning and verbal and literacy skills is borne out in the crucible of the criminal trial court. Law enforcement is a highly skilled professional service. The ability to swing a nightstick no longer measures a policeman's competency for his exacting role

in this city. Plaintiffs, by reply brief without supporting facts, argue at the eleventh hour that the Test is culturally slanted to favor whites. There is no proof to this effect. The test is sealed because it is given on a regular basis to many federal job applicants. There is nothing in its text that supports the argument advanced. The Court is satisfied that the undisputable facts prove the test to be reasonably and directly related to the requirements of the police recruit training program and that it is neither so designed nor operates to discriminate against otherwise qualified blacks. *Buckner* v. *Goodyear Tire and Rubber Co.*, 339 F. Supp. 1108, 1115 & n. 7 (N.D. Ala. 1972); *Spurlock* v. *United Airlines, Inc.*, 330 F. Supp. 228, 235 (D. Colo. 1971); *see Castro* v. *Beecher*, 334 F. Supp. 930, 942 (D. Mass. 1971), *aff'd and rev'd in part*, 4 CCH EPD ¶ 7783 (1st Cir. April 26, 1972).

It is of some significance that high test scores and high job performance appear to correlate, but it is clear that blacks and whites with low test scores may often turn in a high job performance. This result may in part reflect the added verbal and educational training received during the training period. In any event, so many factors affect a policeman's performance on the job it is doubtful that a written test could ever be devised that would prophesy performance accurately in advance. None has been suggested here. Instead plaintiffs propose that hiring be conducted without any test or merely a lowering of the acceptable "pass" rating from 40 to 35. The lack of job performance validation does not defeat the Test, given its direct relationship to recruiting and the valid part it plays in this process.

The Department is constantly raising and improving its professional standards. The training program changes as funds are available and needs to emphasize different aspects of a policeman's complex responsibilities are perceived. The day may soon be at hand when a college de-

gree will be a prerequisite and advancement will depend in large part upon graduate degree experience. The FBI and the military have moved in this direction, and the President's Crime Commission has urged that police recruiting and training take this course.

Neither the Fifth Amendment nor the Civil Rights Act require that brakes be placed upon efforts to upgrade recruiting and job standards in law enforcement work. The plaintiffs' claim is not supported by any substantial evidence. The defendants should not be required on this showing to lower standards or to abandon efforts to achieve excellence.

The Metropolitan Police Department is a model nationwide for its success in bridging racial barriers. It would be a setback for blacks and whites alike to lower standards of recruitment. The proof is wholly lacking that a police officer qualifies on the color of his skin rather than ability.

Federal defendants' motion for summary judgment is granted and the amended complaint is dismissed as to them; the District of Columbia defendants' motion for partial summary judgment is granted; and plaintiffs' motion for partial summary judgment is denied.

A status conference concerning the promotional aspects of the case is set for September 5, 1972, at 12 Noon.

So ordered.

/s/ Gerhard A. Gesell
United States District Judge

July 31, 1972.

RELATION OF D. C. POLICE ENTRANCE TEST SCORES TO RECRUIT SCHOOL PERFORMANCE AND JOB PERFORMANCE OF WHITE AND NEGRO POLICEMEN

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Personnel Measurement Research and Development Center
Standards Division

Bureau of Policies and Standards
United States Civil Service Commission

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I. *Purpose of Study*

At present, to be eligible for recruitment by the Metropolitan Police Department, applicants must be at least 21 years old but less than 30, as of the day of appointment; must be at least 5′ 8″ tall and weigh 140 pounds; have eyesight no worse than 20/40 correctable to 20/20; and must have a high school education, pass an equivalency test or have worked for a year or more in the police department of a large city. They must also pass *a written test*, be valuated by a psychiatrist and undergo a character investigation. This report is concerned with evaluating the effectiveness of a written test as a part of the selection process. The test referred to (Test 21) is an 80-question verbal test used for selection to positions where no higher ability is required than is represented by High School graduation. Forty correct answers are required for passing.

II. *Sample and Data Available for Study*

For 361 policemen appointed to the D.C. force in the calendar year 1963 and carried through to June 1967, the Police Department from official records furnished the following items of information:

1. Race
2. Score on T. 21
3. Recruit School Exams Failed
4. Recruit School Final Average
5. Commendations
6. Trial Board or Formal Actions
7. Job Performance Rating (usual rating of subordinate by his supervisor)
8. Positions of Responsibility
9. Separations and Reasons

The two major criteria in the data for evaluating the test are 4) Recruit School Final Average, and 7) Job Performance Rating. In addition, clues to performance are provided by the information dealing with "resignations with prejudice," disciplinary actions, commendations and appointments to positions of responsibility.

III. *Relation of Scores on Entrance Test (T. 21) to Recruit School Final Average*

Sometime within his first year, the policeman is assigned to Recruit School for twelve weeks. Eight subject matter areas are covered in the training. Each of the subjects are tested and 70% right is required in each subject. The Recruit School Final Average is simply the average of these eight percentages on the tests. *There are for all practical purposes no failures in Recruit School. Officers who are doing poorly on a particular area are given help and allowed to repeat the test.*

Prediction of Training School success is a primary function of the entrance test. For analysis of test scores, a Recruit School Average of 85% was designated as "good" performance. Table I relates, by race, scores on Test 21 to the percentage of the group whose Recruit School Average was 85% or higher.

TABLE 1

Scores on Test 21 Related to Recruit School Average by Race

A	B	C	D	E	F	G	H	I	J	K
	White					Negro				
	Recruit School Ave.					Recruit School Ave.				
	Number		Percent			Number		Percent		
Test 21	In School	85% & Up	85% & Up	No R.S. Ave.	Total	In School	85% & Up	85% & Up	No R.S. Ave.	Total
61+	83	76	92%	10	93	9	7	78%	1	10
52-60	86	69	80	9	95	23	16	70	4	27
40-51	73	46	63	13	86	39	21	54	4	43
No T. 21 Score	1	—	—	5	6	1	1	—		1
Total	243	191	79%	37	280	72	45	63%	9	81

The data in Cols. "D" and "I" show a positive relationship between scores on T. 21 and performance in Recruit School for both the white and Negro groups. The higher the score on T. 21 the more likely the trainee will have a Recruit School Average of 85% or higher. (The correlation is .46 for whites and .39 for Negroes. These values are increased to .65 and .58 respectively when corrected for restriction in range.)

This finding supports the conclusion that T. 21 is effective in selecting trainees who can learn the material that is taught at the Recruit School. There is apparently a difference in the degree of success in Recruit School be-

tween the white and Negro trainees—the white group doing somewhat better than the Negro group. However, there is no basis in these data to explain this difference.

IV. *Relation of Recruit School Average to Job Performance Rating*

The performance rating represents the last rating that appears in the policeman's official folder. It represents a summary rating over some nine individual rating items. The ratings range from +4—outstanding to -4—unsatisfactory with O representing "effective or competent" performance.

The distribution of the assigned ratings is shown in Table 2. Table 3 summarizes the totals shown in Cols. "E" and "I" of Table 2.

TABLE 2

Distribution of Performance Ratings by Current Employed Status

A	B	C	D	E	F	G	H	I
	White				Negro			
		Resigned				Resigned		
Performance Rating	Still Empl.	Vol.	Prej.	Total	Still Empl.	Vol.	Prej.	Total
+4	1			1				
+3	12			12	3			3
+2	29	3		32	8	1		9
+1	51	19	2	72	14		1	15
0	67	48	6	121	28	7	1	36
−1	1	1	2	4	3		2	5
−2			1	1			3	3
−3							1	1
−4								
Total	161	71	11	243	56	8	8	72
No Rating	2	27	7	36	1		8	9
Grand Total	163	98	18	279*	57	8	16	81

* Does not include 1 man killed in action.

TABLE 3

Distribution of Ratings (Summary of Cols. E & I Table 2)

Ratings	White N	White %	Negro N	Negro %
Above Average (+1 to +4)	117	43	27	37.5
(Effective and Competent) (0)	121	50	36	50
Below Average (−1 to −4)	5	2	9	12.5
Subtotal	243	100%	72	100%
No Rating	37	—	9	—
Total	280		81	

The white group tends to be rated higher than the Negro group. Whether this represents real differences in performance or whether different rating standards have been applied to the two groups cannot be determined from these data.

The difference in the voluntary separation rates (leaving *without* prejudice) of the two groups is striking. After approximately four years, 35% of the white group left without prejudice as compared to 10% for the Negro group. The overall separation rate is 42% for the white group and 30% for the Negro.

Table 4 presents the relationship between Recruit School Average and the Performance Rating. Does high performance in Recruit School predict high performance on the job?

TABLE 4

Recruit School Average Compared to Job Performance Rating

Recruit School Average	White			Negro		
	Performance Rating			Performance Rating		
	N	Number Above Ave. (+1 to +4)	Percent "Above Ave."	N	Number Above Ave. (+1 to +4)	Percent "Above Ave."
85% or higher	191	98	51	45	16	36
84% or lower	52	19	37	27	11	41
Subtotal	243	117	48%	72	27	38%
No Sch. Rating	37	—		9		
Total	280			81		

For white officers, those who had a Recruit School Average of 85% or higher were more likely to be rated "above average" on the job (51%) than their colleagues whose school average was below 85% (37%).

For the Negro officers this is not the case. In fact the trend is slightly in the opposite direction, but the number of cases is too small to conclude that there is a significant relationship between school and job performance.

V. *Relation of Entrance Test Scores to Job Performance Rating*

While the primary emphasis of the entrance test must be to select persons who can absorb the training at Recruit School, does it appear to have value in identifying those who will also do well on the job? Table 5 compares scores on Test 21 and performance rating.

Test 21 apparently behaves like the Recruit School Average in predicting on-the-job rating. For the white officer, the higher his score on Test 21, the more likely he is to receive an "above average" performance rating. For the Negro officer, test score appears to be unrelated to performance rating.

TABLE 5

Test 21 Scores Compared to Job Performance Rating

Test 21 Score	White		Negro	
	N	Percent Rated "Above Ave."	N	Percent Rated "Above Ave."
61+	83	57%	9	37%
52-60	86	52%	23	
40-51	73	33%	39	39%
No T. 21 Score	1	—	1	—
Subtotal	243	48%	72	38%
No Rating	37		9	
Total	280		81	

The relations of combinations of test score and school average to performance were also examined. This showed again that for whites, there is a positive relation, but that for Negroes, the performance rating was not related to test and school scores combined, any more strongly than to these measures one at a time.

VI. *Relation of Entrance Test Scores to Other Performance*

How are the test scores related to *poor incidents of performance*, i.e., any one of the following: a "below average" performance rating, "resigning with prejudice," or trial board or other formal disciplinary action? Fourteen percent of the white officers and 45% of the Negro officers had at least one of these three in his record. This record is related to Test 21 scores in Table 6.

For the whites, high scores on Test 21 have relatively fewer negative incidents in their record. For the Negroes the difference is in the opposite direction; the most obvious finding, however, is the great disparity in the propor-

tions of whites and Negroes who have had negative incidents.

TABLE 6

Test 21 Scores Related to Negative Performance Incidents

	White			Negro		
Test 21	N	Number With Neg. Incident	Percent With Neg. Incident	N	Number With Neg. Incident	Percent With Neg. Incident
52 & up	169	17	10%	30	17	57%
40-51	73	16	22%	41	15	37%
No T. 21	1			1		
Subtotal	243	33	14%	72	32	45%
No Rating	37	—	—	9	—	—
Total	280			81		

Evidences of positive job performance are having received a commendation or been appointed to a position of responsibility. Comparable proportions of the white group (27%) and of the Negro group (30%) received either one or both. Table 7 compares scores on Test 21 with this measure of "positive performance."

TABLE 7

Test 21 Scores Related to Positive Performance Incidents

	White		Negro	
Test 21	N	Percent with "Positive Incid."	N	Percent with "Positive Incid."
52 & up	169	31%	30	30
40-51	73	18	41	29
Subtotal	242	27%	71	30%
No Score or Rating	38		10	
Total	280		81	

Here again the test scores appear to distinguish among the white group in terms of positive behavior on the job but do not distinguish among the Negroes.

VII. *Summary of Findings*

1. Scores on Test 21 (40 and above) show a reasonably high relationship to performance in Recruit School for both the white and Negro appointees.
2. For the white officers, Test 21 (40 and above) to an appreciable extent predicts job performance as measured by supervisory ratings, negative behavior incidents or evidences of positive performance.
3. For the Negro officers, Test 21 (40 and above) does not predict differences in on-the-job performance.
4. For white officers, performance in Recruit School has a positive relationship to job performance. This relationship does not hold for the Negro officers.
5. Practically no white officers receive less than an adequate job performance rating. This percentage is higher for the Negro group.
6. For all appointees, failure to complete Recruit School is, for all practical purposes, non-existent.

VIII. *Possible Actions Suggested by the Study Results*

1. *Test Content*

1. So long as all new appointees must go through recruit school which is largely academic in nature, some type of verbal test seems necessary. The present test has relatively high

validity for this purpose. There is no reason to believe that replacing the present content with other verbal test questions would improve the validity. However, since Test 21 is a widely used verbal test, it is being reviewed to insure that the item types continue to be appropriate for the various uses of this test.

2. *Test Scoring Standards*

Since all selectees at the current standard on Test 21 of 40 correct complete Recruit School, the Department would run only a small risk by accepting applicants in a modest range of scores below 40. By setting a standard of 35 right, an additional 15% of applicants would be eligible. This standard would still represent the reading level of at least the eleventh grade. In terms of Recruit School, this additional group would be expected to do less well but still good enough to complete the training. At scores below 35, there would be a probably excessive proportion of recruits who would find it difficult to master the training.

If the test standard is lowered to add more recruits, the Department should anticipate increased difficulty in carrying out their policy of getting every recruit through the Recruit School. It might well reexamine this policy and also its use of the probationary period as an effective means for dropping officers who should not be carried into the permanent force.